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Thurairajah a/l Moideen Kunhi Koyama v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–19 OF 2010
SULAIMAN DAUD, SYED AHMAD HELMY AND APANDI ALI JJCA
24 MAY 2012

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in — Appeal — Whether trial judge erred in findings that defence version not credible and an afterthought — Whether trial judge erred in finding defence fictitious and bare denial even before considering defence — Whether trial judge's conclusion of adverse comments and assumption of guilt amounted to misdirection warranting quashing of conviction

The appellant was charged for an offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). At the close of the prosecution's case, the learned trial judge amended the charge against the appellant to possession of the said drugs under s 12(2) of the DDA. The appellant pleaded guilty to the amended charge and was sentenced to 13 years imprisonment and ten strokes of the rotan. The public prosecutor's appeal against the decision of the High Court was allowed by the Court of Appeal where the appellant was ordered to enter his defence that was to be heard before the same trial judge. At the end of the defence's case, the learned High Court judge convicted the appellant as per the charge. It was against that decision of the High Court that the appellant is now appealing to this court. In mounting a challenge to the decision of the learned trial judge, the defence advanced three main grounds as follows: (i) the learned trial judge erred in her findings that the defence version was not credible and an afterthought by reason of belated disclosure that failed to raise any doubt on the prosecution's case; (ii) the learned trial judge erred in not holding that the admission by SD2 that the bag containing the incriminating drugs belonged to him which piece of evidence not only rebuts the issue of possession but also corroborates the appellant's defence of innocent carrier; and (iii) the learned trial judge erred in her conclusion that the defence was fictitious and one of bare denial even before considering the defence. Her conclusion as such constituted adverse comments and an assumption of guilt of the appellant, the consequence of which amounts to a misdirection warranting the quashing of the conviction.

Held, dismissing the appeal, affirming the conviction and sentence by the High Court:

(1) There was no reason for this court to disagree with the learned trial judge's conclusion that the appellant's defence was a bare denial and an

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afterthought as it was evidently clear that this part of his defence was never put to the prosecution's witnesses especially PW3 and PW4 who could have verified or denied the existence of his friend Mat when they walked into the restaurant. In fact, the evidence of PW3 and PW4 which established that the appellant was walking alone carrying the bag ('P5') and walking towards the restaurant before being apprehended after a scuffle, justified her findings. The evidence by itself demolished the defence of innocent carrier (see paras 19 & 22).

(2) The appellant's conduct of dropping the bag ('P5') and trying to run away upon PW3 shouting 'police' points to no other inference but of his knowledge of drugs subsequently recovered in P5. There was no error on the part of the learned trial judge in taking into account the appellant's conduct of remaining silent upon being questioned about P5 against him, the failure to inform PW3 and PW4 on the existence of the character, Mat, at the restaurant toilet and the fact that P5 belonged to Mat. These were factors which the trial judge was entitled to consider against the appellant in assessing the weight of his defence (see paras 39–40).

(3) Aside from the weight to be attached to the defence, the trial judge was correct in disbelieving the defence story. The learned trial judge went further after disbelieving the defence by considering whether the defence created a doubt and concluded that in the final analysis, it did not. Hence, the defence's submission that the learned trial judge's conclusion was adverse and an assumption of guilt were without merits and without any basis (see paras 41–42).

(4) The trial judge did address her mind to whether the defence had proffered an explanation to rebut the presumption of trafficking on a balance of probabilities. Upon evaluating the evidence the learned trial judge concluded that the appellant failed to discharge the onus so placed for which this court had no reason to disagree (see para 42).

[Bahasa Malaysia summary

Perayu dituduh bagi satu kesalahan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Di akhir kes pendakwaan, hakim perbicaraan yang bijaksana meminda pertuduhan terhadap perayu kepada milikan dadah tersebut di bawah s 12(2) ADB. Perayu mengaku bersalah terhadap pertuduhan pindaan dan dihukum penjara 13 tahun dan sepuluh sebatan rotan. Rayuan pendakwa raya terhadap keputusan Mahkamah Tinggi dibenarkan oleh Mahkamah Rayuan yang mana perayu diperintahkan membela diri yang sepatutnya dibicarakan oleh hakim perbicaraan yang sama. Di akhir kes pembelaan, hakim Mahkamah Tinggi yang bijaksana mensabitkan perayu seperti yang dituduh. Perayu kini merayu terhadap keputusan Mahkamah Tinggi tersebut ke mahkamah ini. Dalam mencabar

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keputusan hakim perbicaraan yang bijaksana, pembelaan mengemukakan tiga alasan utama seperti berikut: (i) hakim perbicaraan yang bijaksana khilaf di dalam penemuannya bahawa versi pembelaan tidak boleh dipercayai dan adalah fikiran semula atas alasan pendedahan terlambat yang gagal membangkitkan apa-apa keraguan terhadap kes pendakwaan; (ii) hakim perbicaraan yang bijaksana khilaf apabila tidak memutuskan bahawa pengakuan oleh SD2 bahawa beg yang mengandungi dadah yang menunjukkan kebersalahan adalah kepunyaannya yang mana keterangan tersebut bukan hanya mematahkan isu milikan malah menyokong pembelaan pembawa tidak bersalah perayu; dan (iii) hakim perbicaraan yang bijaksana khilaf di dalam keputusannya bahawa pembelaan tersebut adalah rekaan dan penafian semata-mata walaupun sebelum mempertimbangkan pembelaan. Keputusannya, oleh itu, membentuk komen yang bertentangan dan anggapan kebersalahan perayu, yang mana akibatnya menjurus kepada salah arahan yang mewajarkan pembatalan sabitan.

Diputuskan, menolak rayuan, mengesahkan sabitan dan hukuman Mahkamah Tinggi:

(1) Tidak ada alasan bagi mahkamah ini untuk tidak bersetuju dengan keputusan hakim perbicaraan yang bijaksana bahawa pembelaan perayu adalah penafian dan fikiran semula kerana ia jelas dibuktikan bahawa bahagian pembelaannya ini tidak pernah dikemukakan kepada saksi-saksi pendakwaan khususnya PW3 dan PW4 yang mungkin boleh mengesahkan atau menafikan kewujudan rakannya Mat apabila mereka berjalan masuk ke restoran. Sebenarnya, keterangan PW3 dan PW4 membuktikan bahawa perayu berjalan seorang diri membawa beg (P5) dan berjalan ke arah restoran sebelum ditangkap selepas satu perkelahian, menjustifikasi penemuannya. Keterangan tersebut dengan sendirinya memusnahkan pembelaan pembawa tidak bersalah (lihat perenggan 19 & 22).

(2) Tindakan perayu menjatuhkan beg (P5) dan cuba melarikan diri selepas PW3 menjerit 'polis' mengarahkan kepada anggapan pengetahuannya tentang dadah yang kemudiannya ditemui dalam P5. Tidak ada kekhilafan pada pihak hakim perbicaraan yang bijaksana dalam mengambil kira tingkah laku perayu mendiamkan diri apabila disoal tentang P5 terhadapnya, kegagalan memberitahu PW3 dan PW4 tentang kewujudan watak Mat, di tandas restoran dan fakta bahawa PW5 adalah kepunyaan Mat. Ini adalah faktor-faktor yang hakim bicara berhak mempertimbangkan terhadap perayu dalam menilai berat pembelaannya (lihat perenggan 39–40).

(3) Selain daripada berat yang perlu diberikan kepada pembelaan, hakim perbicaraan juga betul dalam tidak mempercayai cerita pembelaan. Hakim perbicaraan yang bijaksana memberikan pertimbangan lanjut

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selepas tidak mempercayai pembelaan, dengan mempertimbangkan sama ada pembelaan membangkitkan keraguan dan memutuskan, dalam analisa akhir bahawa ia tidak membangkitkan keraguan. Dengan itu, hujahan pembelaan bahawa keputusan hakim perbicaraan yang bijaksana adalah bertentangan dan anggapan kebersalahan adalah tidak bermerit dan tidak berasas (lihat perenggan 41–42).

(4) Hakim perbicaraan telah memberikan pertimbangan sama ada pembelaan telah memberikan penjelasan untuk mematahkan anggapan pengedaran atas imbangan kebarangkalian. Selepas meneliti keterangan, hakim perbicaraan yang bijaksana memutuskan bahawa perayu gagal melepaskan beban yang diletakkan ke atasnya, yang mana tidak ada alasan untuk mahkamah ini untuk tidak bersetuju (lihat perenggan 42).]

Notes

For cases on s 39B(1)(a), see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 481–669.

Cases referred to

Chua Beow Huat v PP [1970] 2 MLJ 29 (refd)
Lim Beng Soon v PP [2000] 4 SLR 589, CA (refd)
Mah Kok Cheong v R [1953] MLJ 46 (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (refd)
Pendakwa Raya v Kang Ho Soh [1992] 1 MLJ 360, HC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1, FC (refd)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)
Ramis a/l Muniandy v PP [2001] 3 SLR 534, CA (refd)
Tan Ah Tee & Anor v PP [1980] 1 MLJ 49 (refd)
Teng Howe Sing v PP [2009] 3 MLJ 46; [2009] 3 CLJ 733, FC (refd)
Tong Peng Hong v PP [1955] MLJ 232 (refd)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 39A(2)(d), 39B(1)(a), (2)

Appeal from: Criminal Trial No: 45–13 of 2001 (High Court, Kuala Lumpur).

J Kuldeep Kumar (J Kuldeep Kumar & Co) for the appellant.
Mangaiarkarsi d/o Krishnan (Deputy Public Prosecutor) (Attorney General's Chambers) for the respondent.

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Syed Ahmad Helmy JCA:

INTRODUCTION

[1] The appellant was charged for an offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') punishable under s 39B(2) of the same Act in the High Court of Kuala Lumpur and the said charge reads as follows:

> Bahawa kamu pada 14 November 2000 jam lebih kurang 4.45 petang di dalam Restoran Online Cafe, No. 205/207, Jalan Selisih 7, Taman Sri Kuching, Sentul, Kuala Lumpur, Wilayah Persekutuan telah mengedar dadah berbahaya iaitu 99.36 gram campuran heroin dan monoacetylmorphines (35.35 gram heroin dan 64.01 gram monoacetylmorphines) dan oleh yang demikian kamu telah melakukan satu kesalahan dibawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum dibawah Seksyen 39B(2) Akta yang sama.

[2] At the close of the prosecution's case, the learned High Court judge had amended the charge against the appellant to possession of the said drugs under s 12(2) and punishable under s 39A(2)(d) of the Dangerous Drugs Act 1952.

[3] The appellant pleaded guilty to the amended charge and the High Court sentenced him to 13 years imprisonment with effect from the date of his arrest and ten strokes of the rotan.

[4] The public prosecutor being dissatisfied with the decision of the High Court in amending the charge from trafficking to one of possession filed an appeal to the Court of Appeal.

[5] On 29 June 2009, the Court of Appeal allowed the public prosecutor's appeal and ordered the appellant to enter his defence to be heard before the same trial judge.

[6] On 20 November 2009, the appellant gave sworn evidence and called a witness to support his testimony. At the end of the defence's case, the learned High Court judge convicted the appellant as per the charge. It is against that decision of the High Court which the appellant is now appealing to this Honourable Court.

BRIEF FACTS

[7] On 14 November 2000, based on information received regarding the drug trafficking activity of a male Indian at the Restoren Online Cafe at Jalan

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Selinsing 7, Taman Sri Kuching, Sentul Kuala Lumpur PW3, PW4 and D/L/Corporal Wee Chin Haw posed as customers and stationed themselves in the restaurant. The second team led by C/Insp Haslah binti Bachok and another police personnel took their position outside the restaurant along a row of terraced house whilst, D/L/Corp Sargeant Baharuddin bin Keling took his position on the road at Jalan Selinsing 7 itself.

[8] The third team comprising of D/Sargeant Harvinder Singh and D/L/Corp Ali Ahmad bin PU Aboo was stationed at the car park at the back of the restaurant. The last team comprising of two other police personnel remained in the police car and waited at the back entrance of the restaurant.

[9] In the restaurant, PW3 sat at one table facing the back of the restaurant while PW4 and L/Corp Wee Chin Haw sat together at another table.

[10] At about 4.45pm PW3 heard the sound of a motorcycle coming and stopping at the back entrance of the restaurant. Not long after that he saw the appellant entering the restaurant carrying a dark green bag ('P5') in his right hand. PW3 then gave the signal to PW4 to approach the appellant.

[11] When PW4 was approaching the appellant, PW3 shouted 'police', whereupon the appellant dropped the bag from his hand and tried to run to the back of the restaurant. There was a struggle between PW4 and the appellant who tried to resist arrest during which PW4 was thrown to the floor and was slightly injured on the head.

[12] At that point, PW3, L/Corp Amirudin and L/Corp Ali Ahmad bin PU Aboo also joined in to assist PW4 to arrest the appellant. After a brief struggle, the appellant was finally subdued and arrested. PW3 retrieved the bag (P5) which was earlier dropped by the appellant.

[13] PW3 then opened the bag in the presence of the appellant and the other police witnesses and took out three clear plastic packets containing some pinkish powdery and granular substance suspected to be heroin. The appellant remained silent when asked about the bag and the three packets.

[14] Thereafter, the appellant together with the bag (P5) and the three plastic packets of pink powdery and granular substances (P7, P8 and P9), the motorcycle with registration No WFA 6764 (P22) together with its key (P12), a yellow helmet (P18) on the motorcycle and the appellant's Nokia hand phone (P19) were brought back to the Kuala Lumpur Police Headquarters for further investigation.

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[15] The three plastic packets of pinkish powdery and granular substances were subsequently sent for analysis to the Chemistry Department and were confirmed by the chemist, PW1 to be a mixture of 35.35g of heroin and 65.01g of monoacetylmorphines with a total weight of 99.36g.

FINDINGS OF THE HIGH COURT

[16] The pertinent parts of the judgment of the learned trial judge in convicting the appellant for the charge of trafficking is found at pp 148–156 of the appeal record. Her Ladyship held at p 149 that:

> … Versi pembelaan pada hari kejadian termasuk nama Mat langsung tidak pernah dicadangkan atau dikemukakan semasa peringkat pendakwaan kepada mana-mana saksi pendakwaan. Jelas sekali bahawa jika cerita yang diutarakan oleh Tertuduh sebenarnya berlaku, tentu sekali saksi-saksi pendakwaan terutamanya SP3 dan SP4 telah dicabar atau dicadangkan dengan fakta sedemikian pada peringkat pendakwaan dan kegagalan ini menunjukkan bahawa pembelaan yang dikemukakan adalah satu fikiran kemudian ('afterthought') dan satu rekaan semata-mata pada peringkat pembelaan …
>
> Maka Mahkamah mendapati pembelaan Tertuduh bahawa beg hijau P5 kepunyaan Mat adalah satu penafian semata-mata yang tidak disandarkan kepada apa-apa bukti yang mencukupi untuk menimbulkan keraguan munasabah terhadap kes pendakwaan yang diterima oleh Mahkamah sebelum ini …
>
> Walaupun Mahkamah berpendapat pembelaan Tertuduh adalah satu rekaan semata-mata Mahkamah masih perlu menimbangkan pembelaan dengan sewajarnya seperti yang diputuskan oleh Mahkamah Persekutuan di dalam kes *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209.

[17] In mounting a challenge to the decision of the learned trial judge, the learned defence counsel advanced three main grounds:

(a) learned trial judge erred in her findings that the defence version is not credible and an afterthought by reason of belated disclosure that failed to raise any doubt on the prosecution's case;

(b) learned trial judge erred in not holding that the admission by SD2 that the bag containing the incriminating drugs belonged to him which piece of evidence not only rebuts the issue of possession but also corroborates the appellant's defence of innocent carrier; and

(c) the learned trial judge erred in her conclusion that the defence was fictitious and one of bare denial even before considering the defence. Her conclusion as such were adverse comments and an assumption of guilt of the appellant by the learned trial judge the consequence of which amounts to a misdirection warranting the quashing of the conviction.

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[18] On the first ground of challenge we directed our attention to the learned trial judge's grounds of judgment appearing at pp 147–156 and note that the learned trial judge addressed at length the defence put forth by the appellant. She narrated both the defence and prosecution version of the events on the fateful day which she found differed materially before concluding that the defence was a bare denial and an afterthought.

[19] Upon evaluating the learned trial judge's reasoning as reflected in her written grounds of judgment there is no reason for us to disagree with her conclusion that the appellant's defence was a bare denial and an afterthought as it is evidently clear that this part of his defence were never put to the prosecution's witnesses especially PW3 and PW4 who could have verified or denied the existence of his friend Mat when they walked into the restaurant. The clarity and reasoning of her conclusion appearing in para 17 of her written grounds of judgment at p 149 of the appeal record is reproduced:

> Versi pembelaan pada hari kejadian termasuk nama Mat langsung tidak pernah dicadangkan atau dikemukakan semasa peringkat pendakwaan kepada mana-mana saksi pendakwaan. Jelas sekali bahawa jika cerita yang diutarakan oleh Tertuduh sebenarnya berlaku, tentu sekali saksi-saksi pendakwaan terutamanya SP3 dan SP4 telah dicabar atau dicadangkan dengan fakta sedemikian pada peringkat pendakwaan dan kegagalan ini menunjukkan bahawa pembelaan yang dikemukakan adalah satu fikiran kemudian ('after-thought') dan satu rekaan semata-mata pada peringkat pembelaan.

[20] In *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29, at p 32 the court referred to an Indian authority where it was held that:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. *If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety.* Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated …

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[21] On the evidence proffered by DW2 in support of the defence the learned trial judge gave due consideration to DW2's evidence before concluding that his evidence does not merit much weight because his story is not logical. This was what she stated at p 150 of the appeal record:

> Di dalam kes ini, mahkamah telah memberi pertimbangan yang sewajarnya ke atas keterangan pembelaan dan mendapati ianya tidak kredible dan tidak boleh diberi sebarang keberatan (any weight) dari beberapa aspek. Di dalam kes ini identity SB2 sebagai seorang lelaki Melayu yang nama panggilannya En. Mat tidak terbukti. Hubungan Tertuduh dan SB2 sebagai kawan lama juga kabur dan tidak jelas. Walaupun Tertuduh kata beliau kesuntukkan masa kerana perlu balik cepat untuk memberi barang keperluan kepada isteri yang berniaga kedai makan, tetapi apabila sampai di kedai beliau sanggup masuk ke dalam restoran duduk di meja dan menempah minuman sementara menunggu Mat. Cerita ini tidak logik sama sekali. Manakala SB2 yang dikatakan tidak memilikki sebarang kenderaan tiba-tiba ada membawa satu topi keledar semasa menunggu bas di perhentian bas. Cerita SB2 bahawa dia bawa topi keledar kerana kawan beliau berjanji untuk membawa dia dengan motor adalah satu cerita kosong sahaja yang tidak boleh dipercayai. Selain daripada itu, keterangan SB2 bahawa selepas menyerahkan beg hijau kepada Tertuduh dalam restoran dia telah berpatah balik ke belakang restoran untuk meletakkan topi keledar beliau di atas motorsikal juga tidak boleh dipercayai. Soalnya mengapa tidak serahkan topi keledar beliau kepada Tertuduh bersama dengan beg hijau itu? Cerita ini sengaja diadakan memandangkan keterangan pendakwaan ialah suatu topi keledar warna kuning ada dijumpai di atas motorsikal yang ditunggang oleh Tertuduh …
>
> Oleh demikian Mahkamah mendapati versi pembelaan tidak kredible dan tidak dapat menyangkal keterangan pihak pendakwaan …

[22] We unanimously approve and affirm the findings of the learned trial judge. In our view the evidence of PW3 and PW4 which establishes that the appellant was walking alone carrying the bag (P5) and walking towards the restaurant before being apprehended after a scuffle justifies her findings. The evidence by itself demolished the defence of innocent carrier.

[23] The learned trial judge did consider every aspect of the appellant's defence before arriving at her conclusion that the defence was not only incredible but also did not raise any doubt on the prosecution's case. In *Mah Kok Cheong v R* [1953] MLJ 46, at p 47 the court held that:

> … Almost all defence put forward by an accused is consistent with innocence or it would not be put forward; nor would it be a very good defence if it could not reasonably be true. But whatever may be the defence to a criminal charge the sole question which a subordinate court has to ask itself at the conclusion of the trial is — Does the defence raise a reasonable doubt as to the truth of the prosecution case or as to the accused's guilt? …

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[24] In this respect it is trite that an appellate court would be slow to disturb a finding of fact made by the trial judge who had the audio visual advantage of seeing and hearing both the prosecution as well as the defence's witnesses.

[25] The second and third grounds of challenge are taken together.

[26] The thrust of the appellant's challenge was the failure of the trial judge to consider the material aspects of the defence namely the admission by SD2 that the bag containing the drugs belonged to him and whether SD2's evidence as such had rebutted and raised a reasonable doubt as to the element of knowledge in possession as no where in her judgment was it alluded to.

[27] Turning to the defence learned defence counsel submits that the following material aspects of possession were not considered by the trial judge namely:

1 That the beg hijau (P5) Panasonic does not belong to him.

2 That the beg hijau (P5) belongs to his friend, Mat's boss. Appellant bumped into Mat at Leboh Ampang.

3 Mat told Appellant that his boss asked him to deliver the bag to someone at a restaurant in Jalan Kuching and that he needed a ride there.

4 That the Appellant had given a lift to his friend, Mat and took him to that restaurant in Jalan Kuching.

5 When they arrived at the restaurant, both of them went into the restaurant. Mat asked him to carry the bag into the restaurant while Mat went to the toilet and then the Appellant went into the restaurant and kept the bag on the chair next to him.

6 He was not told of what was inside the bag and he had no knowledge on the contents of it.

7 2 to 3 persons unknown to him beat him up and he fainted. The police, did not introduce themselves.

8 The police never showed him the contents of the bag and never asked him whether he knew what was inside the bag at any material times.

9 Regarding the helmet, Appellant brought his helmet into the restaurant and he did not know what his friend Mat, did with his.

10 At IPK, he was beaten up again and one of the policemen said 'Mana lagi seorang yang telah melarikan diri.'

[28] The aforesaid material aspects of the defence was, submits learned defence counsel corroborated by DW2, whose evidence would amply create a reasonable doubt on the culpability of the accused with the impugned drugs in

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that it establishes that the bag P5 was not the appellant's, and hence negatives the appellant's knowledge of the contents thereof and that he was only a momentary and innocent carrier.

[29] Hence by rejecting the defence as illogical instead of considering the rebuttal evidence or reasonable doubt the trial judge had placed a higher burden on the appellant.

[30] In addressing the defence challenge aforesaid it is appropriate to look into the sequence of events that led to the recovery of the drugs to determine the possession issue.

[31] The learned trial judge in finding the possession issue, namely the physical element of custody and control and the mental element of knowledge took into consideration the following sequence of events, namely:

(a) the appellant was seen walking alone to the restaurant and carrying P5 by PW3 and PW4;

(b) inside the bag were three transparent plastic packets containing the proscribed drugs;

(c) upon PW3 introducing himself as 'police', the appellant dropped the bag and tried to run away;

(d) the appellant was arrested after a scuffle where PW4 was injured; and

(e) upon being questioned about the bag, P5, the appellant remained silent.

[32] By reason thereof she was satisfied that the appellant was in possession of the drugs found in the P5.

[33] In this connection reference is made to the Federal Court decision in *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1.

[34] In *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1, the Federal Court discussed the question of 'possession' in relation to drugs found in a vehicle and considered the views of Shankar J in *Pendakwa Raya v Kang Ho Soh* [1992] 1 MLJ 360, Thompson J in *Tong Peng Hong v Public Prosecutor* [1955] MLJ 232 and a Singapore case, *Lim Beng Soon v Public Prosecutor* [2000] 4 SLR 589. Applying the principles enunciated in those cases to the facts before the court, the Federal Court held that the presence of the three packages in the car without a plausible explanation from the respondent could give rise to a strong inference that he had knowledge that the packages contained drugs or things of similar nature.

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[35] In *Abdul Rahman Akif*'s case, the Federal Court referred to a Singapore case *Ramis a/l Muniandy v Public Prosecutor* [2001] 3 SLR 534 on the issue of possession and stated:

> In *Ramis a/l Muniandy v PP* [2001] 3 SLR 534, the Singapore Court of Appeal again propounded on the question of knowledge necessary to establish possession and at p 541 states:
>
> *Knowledge of drugs*
>
> The starting point in the consideration of this issue was that we had already concluded that the drugs was already on Ramis's motorcycle when he entered the vicinity and that he had physical control of the drugs. In the absence of any reasonable explanation by Ramis, these facts were sufficient to lead a strong inference that Ramis knew that the bag found on his motorcycle contained drugs.

[36] The Federal Court also approved the Singapore case *Tan Ah Tee & Anor v Public Prosecutor* [1980] 1 MLJ 49 on the issue of possession and held:

> Even if there were no statutory presumptions available to the prosecution, once the prosecution had proved the fact of physical control or possession of the plastic bag and the circumstances in which this was acquired by and remained with the second appellant, the trial judges would be justified in finding that she had possession of the contents of the plastic bag within the meaning of the Act unless she gave an explanation of the physical fact which the trial judges accepted or which raised a doubt in the minds that she had possession of the contents within the meaning of the Act.

[37] In *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356, Lord Wilberforce held at p 394 that:

> In all such cases, *the starting point will be that the accused had physical control of something — a package, a bottle, a container — found to contain the substance. This is evidence — generally strong evidence of possession. It calls for an explanation.* The explanation will be heard and the jury must decide whether there is genuine ignorance of the presence of the substance, or such an acceptance of the package with all that it might contain, or with such opportunity to ascertain what it did contain or such guilty knowledge with regard to it as to make up the statutory possession.

[38] The appellant's conduct in dropping P5 and trying to run away upon hearing the word 'police' from PW3 was another factor taken into consideration by the trial judge in inferring knowledge. In *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19, the Federal Court on the issue of conduct held at p 44 that:

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> The law relating to evidence of conduct is thus patent. If there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s 8 then it is not admissible as it would then be an equivocal act justifying inferences favourable to the accused being drawn. If it satisfies the requirement of s 8 it is admissible. *It must be observed that the degree of proof required to establish evidence of conduct would depend on the nature of the conduct. Conduct like the flight of an accused is a more positive act and is easily established.* On the other hand conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required. *Once admitted the court cannot resort to any other explanation for the conduct or draw inferences on its own accord to render it inadmissible. The onus is on the accused to explain his conduct pursuant to s 9. Such explanation must not be in their barest possible form, but with a reasonable fullness of detail and circumstance …*

[39] Similarly in the factual matrix herein we are in agreement with the learned trial judge's findings that the appellant's conduct of dropping the bag P5 and trying to run away upon PW3 shouting 'police' points to no other inference but of his knowledge of drugs subsequently recovered in P5.

[40] Further we do not see any error on the part of the learned trial judge in taking into account the appellant's conduct of remaining silent upon being questioned about P5 against him and the failure to inform PW3 and PW4 on the existence of the character Mat at the restaurant toilet and the fact that P5 belong to Mat are factors which the trial judge is entitled to consider against the appellant in assessing the weight of his defence. As was held by the Federal Court in *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46; [2009] 3 CLJ 733, which discussed the *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585 principle on this issue:

> … By commenting on the failure of the appellant to provide all relevant information regarding 'Ho Seng' to the police at the time of his arrest or when his cautioned statement (D2) was recorded five days after his arrest does not mean that the learned trial judge had imposed on the appellant a duty to speak/disclose them in his cautioned statement nor did he draw any adverse inference against the appellant. *The learned trial judge's comments on the late disclosure of the real identity of 'Ho Seng' at the defence stage merely goes to show the weight that the court attached to the appellant's defence which is permitted by the law.* On this point we would like to refer to the case of *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585, wherein Lim Beng Choon J at p 591 said that:
>
> > … So we are left with nothing more than the bare oral assertion of the accused that it was Noor Azlan who asked him to collect the bag on behalf of the former and that the accused himself had no knowledge of the contents of P3. If that be the case, one would hardly imagine that he would not have told either PW3 or PW5 at the railway station at Alor Setar at the time of his arrest that P3 belonged to Noor Azlan instead of saying that there was nothing in P3.

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> In *Badrulsham*'s case, the court was of the view that the failure of the accused to inform the raiding officers that the white plastic bag belonged to Noor Azlan at the time of his arrest and only revealing this information during the interrogation two hours after his arrest, goes some way to support the case for the prosecution.
>
> Applying the principle in *Badrulsham*'s case to the facts of the instant case, the learned trial judge was correct to conclude that the appellant had two opportunities to provide information about 'Hos Seng', ie, at the time of his arrest and five days later during recording of his cautioned statement but he failed to do so. *We are therefore of the view that in the circumstances, the appellant's failure to provide relevant information about 'Ho Seng' for the police to carry out a thorough investigation into the probability of his defence, entitled the learned trial judge to disbelieve him …*

[41] Aside from the weight to be attached to the defence the trial judge was in our view correct in disbelieving the defence story. We also note that the learned trial judge went further after disbelieving the defence by considering whether the defence created a doubt and concluding that in the final analysis it did not.

[42] Upon evaluating the totality of the evidence presented and for the reasons hereinbefore stated the submission by the appellant's counsel of the learned trial judge's conclusion being adverse and an assumption of guilt is without merits and without any basis. Before concluding we would also point out that the learned trial judge did address her mind to whether the defence had proffered an explanation to rebut the presumption of trafficking on a balance of probabilities. Upon evaluating the evidence the learned trial judge concluded that the appellant failed to discharge the onus so placed for which we have no reason to disagree.

[43] We are satisfied that the learned trial judge had not committed any appealable error which warrants appellate interference. The conviction in our unanimous view is safe. The appeal is accordingly dismissed and the conviction and sentence of the High Court affirmed.

Appeal dismissed, conviction and sentence by the High Court affirmed.

Reported by Ashgar Ali Ali Mohamed